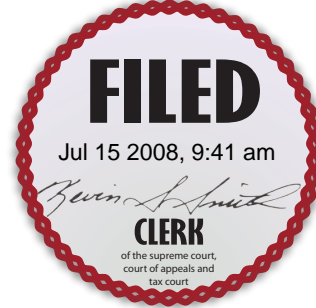


Pursuant to Ind.Appellate Rule 65(D),  
this Memorandum Decision shall not be  
regarded as precedent or cited before  
any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

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Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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|-----------------------|---|----------------------|
| JEFFREY N. NELSON,    | ) |                      |
|                       | ) |                      |
| Appellant-Petitioner, | ) |                      |
|                       | ) |                      |
| vs.                   | ) | No. 29A02-0801-CV-35 |
|                       | ) |                      |
| BROOKE E. NELSON,     | ) |                      |
|                       | ) |                      |
| Appellee-Respondent.  | ) |                      |

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable J. Richard Campbell, Judge  
The Honorable William Greenaway, Magistrate  
The Honorable David Najjar, Magistrate  
Cause No. 29D04-0608-DR-1374

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**July 15, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Jeffrey N. Nelson (“Father”) appeals the trial court’s Modification of its Decree of Dissolution, which changed Brooke E. Nelson’s (“Mother”) parenting time from supervised to unsupervised. We reverse and remand.

## **Issue**

Father raises the sole issue of whether the trial court abused its discretion in modifying Mother’s parenting time without making a finding as to the children’s best interests.

## **Facts and Procedural History**

The Nelsons married and had two children. Father filed his Verified Petition for Dissolution of Marriage and for Emergency Preliminary Hearing. The parties soon stipulated to a preliminary order, giving Father temporary custody of the children and allowing Mother supervised visitation.

In its Decree of Dissolution, the trial court awarded Father legal and physical custody of the children and ordered Mother to have supervised parenting time for one hour per week. The trial court scheduled a review hearing and stated that it was “hopeful that the parties can move toward unsupervised parenting time consistent with the Indiana Parenting Time Guidelines.”<sup>1</sup> Appendix at 31.

After considering evidence presented in the review hearing, the trial court modified the Decree of Dissolution to allow Mother to have unsupervised parenting time for four hours per week. The trial court received additional testimony in response to Father’s Verified

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<sup>1</sup> The Indiana Parenting Time Guidelines “are not applicable to situations involving family violence [or] substance abuse.” Ind. Parenting Time Guideline 1. Allegations concerning both family violence and

Motion to Reconsider, which the trial court denied. Father now appeals.

### **Discussion and Decision**

Father argues that the trial court abused its discretion in modifying Mother's parenting time. Specifically, Father asserts that Mother had the burden of proof and that she failed to present any evidence to support the modification.

#### **I. Standard of Review**

Mother did not file an appellee's brief. "The appellee's failure to file timely the appellee's brief may result in reversal of the trial court or Administrative Agency on the appellant's showing of prima facie error." Ind. Appellate Rule 45(D) (emphasis in original). Prima facie means "at first sight, on first appearance, or on the face of it." Griffin v. Griffin, 872 N.E.2d 653, 656 (Ind. Ct. App. 2007). "[W]e need not undertake the appellee's burden of responding to arguments that are advanced for reversal by the appellant." Id. We review parenting time modifications for an abuse of discretion, with a "preference for granting latitude and deference to our trial judges in family law matters." Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (quoting In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993)).

#### **II. Analysis**

The trial court may modify parenting time "whenever modification would serve the best interests of the child." Ind. Code § 31-17-4-2. The modification, however, must be supported by a finding as to the child's best interests. Hill v. Ramey, 744 N.E.2d 509, 513 (Ind. Ct. App. 2001) (holding that modification of visitation was "improper because the order

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substance abuse have been made in this case.

includes no finding that modification would serve the child's best interests"); see also Duncan v. Duncan, 843 N.E.2d 966, 972 (Ind. Ct. App. 2006) (affirming modification even though the trial court's findings were limited), trans. denied; and Barger v. Pate, 831 N.E.2d 758, 763 (Ind. Ct. App. 2005) (requiring the trial court to enter a finding before making a restricting modification to parenting time).

On December 5, 2007, the trial court heard testimony of Mother, Father, Mother's mother, Melissa Wiley and another witness. It ruled as follows:

[I]n the [Decree of Dissolution] I have put that I am hopeful we can move towards the Indiana Parenting Time Guidelines. But we are simply not there yet. I am very encouraged that you have ninety-three days of sobriety. I think that is definitely the right direction. What I am going to do at this time is that you are going to have parenting time. And this is not what anyone wants. So everyone can keep their opinions about me and my ruling until they get outside the courtroom.

Every Saturday from 10:00 a.m. to 2:00 p.m. In your residence. It does not need to be supervised. You are not to have the children in a motor vehicle. You are to get a psychiatric evaluation within thirty days to get treatment for your bi-polar disorder. . . . You are moving in the right direction. But ma'am let me just caution you, if anything comes up the Court will have an emergency hearing on terminating child support. If you prove to this Court that you can't keep sober, I will probably just go ahead and say forget it no parenting time period, end of story.

Transcript at 67. The trial court made no findings, in court or in its written order, to support its modification.<sup>2</sup> App. at 16. Upon the above authority, we reverse and remand for the trial court to find whether a modification of Mother's parenting time would serve the children's

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<sup>2</sup> After Father filed his Verified Motion to Reconsider, a different magistrate held an additional evidentiary hearing. Father, Mother and Wiley each testified again, as well as a psychiatrist who testified for the first time. The trial court concluded, however, that none of the evidence constituted newly discovered evidence. Accordingly, it denied Father's motion.

best interests.

### **Conclusion**

The trial court abused its discretion in modifying Mother's parenting time without making a finding to support the modification.

Reversed and remanded for proceedings not inconsistent with this Opinion.<sup>3</sup>

FRIEDLANDER, J., and KIRSCH, J., concur.

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<sup>3</sup> There are multiple references in the record to criminal charges pending against Mother. See Transcript at 21-22, 25, 28-31, 43, 47-48, 52-54, 62, 108 and 137-38. For instance, Mother testified that "[Father] took my daughter and I broke my mom's window" and that she violated another protective order. Id. at 30 and 137. Mother's mother testified that Mother "violently attacked me in front of both kids. Physically. She broke into my home. And she has known for years that she is not allowed there." Id. at 47. Indiana Code Section 31-17-2-8.3 creates a rebuttable presumption that a noncustodial parent's parenting time should be supervised for a time if he or she has been convicted of a defined offense and a child of that parent witnessed the crime. In light of the ambiguity in the appellate record, it is not clear whether this statute applies. See also Ind. Code § 31-9-2-29.5 for the definition of "crime involving domestic or family violence," including Trespass and Invasion of Privacy (violation of a protective order).